ABDUL MANAF MOHD BIN GHOWS & 13 ORS.

v.

NUSANTARA TIMUR SDN. BHD. & 2 ORS.

HIGH COURT, KUALA LUMPUR
DATO' ANUAR BIN DATO' ZAINAL ABIDIN J.
[SUIT NO. S6-22-112-90]
27 JANUARY 1994

PRACTICE AND PROCEDURE: Summary judgement - Setting aside of earlier order after further argument - Order 56 r. 2(2) Rules of the High Court 1980 - Application for summary judgement made two months after filing of defence - Delay not explained - Whether sufficient ground for striking out - Triable issues - Whether triable issues raised by defence.

On 3 November 1986 the first to the tenth plaintiffs entered into an agreement with the first defendant for the sale of their respective shares in SN company to the first defendant for a consideration of RM1,000,000. The plaintiffs were paid RM150,000 deposit pursuant to the agreement but the balance sum was never paid. Clause 8.1 of the agreement stated that in the event the first defendant shall fail to complete the purchase of the shares the plaintiffs shall be entitled to forfeit the said deposit of RM150,000 and the agreement shall forthwith be rendered null and void. The second and third defendants were directors in the first defendant company but were not parties to this agreement.

On 17 April 1990 all the three defendants filed their defence resisting the claims. On 19 June 1990 the plaintiffs applied for summary judgement against the defendants for the balance sum but the application was dismissed by the learned Senior Assistant Registrar. The plaintiffs then appealed to the Judge in chambers and on 23 July 1992 the application was allowed and judgement was entered in their favour against the defendants for RM850,000. The second and third defendants later successfully applied for further arguments on the plaintiffs' appeal and raised, *inter alia*, the following objections:

1. The application for summary judgement by the plaintiffs was made long after the filing of defence and since the delay was not explained for, no summary judgement ought to be entered in their favour.
2. The affidavits and pleadings of both parties had raised issues which could only be resolved at a full trial.

Held:

[1] It is indisputable that there was a delay of some two months in making the application for summary judgement after the delivery of defence and that no explanation whatsoever has been offered for the delay. In the event the principle laid down by the Supreme Court in *Krishnamurthy v. Malayan Finance Corporation Bhd.* [1986] 2 MLJ 134 applies and that means that summary judgement in this case should not have been entered for the plaintiffs. Pursuant to O. 56 r. 2(2) of the Rules of the High Court, the order of Court dated 23 July 1992 entering summary judgement for the plaintiffs is therefore set aside.

[2] The various issues raised in the defence and reply and highlighted in the affidavits can only be determined at the trial. The issues of breach of agreement and the forfeiture of RM150,000, which may attract the application of s. 75 of the Contracts Act 1950, together with the other claims of the plaintiffs, including their claims for specific performance and damages, all of which were contested by the defendants, *inter alia*, are triable issues which are best resolved at the trial itself where the trial Judge will have the the advantage of seeing and hearing the witnesses and assessing their evidence and credibility.

[Order of the learned Senior Assistant Registrar dismissing the plaintiffs' application for summary judgement affirmed].

Cases referred to:

Krishnamurthy v. Malayan Finance Corporation Bhd. [1986] 2 MLJ 134 ***(foll)***

Jaganathan v. Linggi Plantations Ltd. [1969] 2 MLJ 253 ***(cit)***

New Straits Times (M) Sdn. Bhd. v. Kumpulan Niaga [1985] 1 MLJ 226 ***(cit)***

National Company for Foreign Trade v. Kayu Raya Sdn. Bhd. [1984] 2 MLJ 300 ***(cit)***

Legislation referred to:

Contracts Act 1950, s. 75
Rules of the High Court 1980, O. 14, O. 56 r. 2(2)

For the plaintiffs - Kadir Kassim; M/s. C.S. Saini & Associates
For the 2nd and 3rd defendants - Wong Kim Fatt (L. Nagarajan with him); M/s. Gulam & Wong

JUDGMENT

Anuar bin Dato' Zainal Abidin J:

The fourteen plaintiffs herein filed this suit against the three defendants on or about 8 March 1990. All the plaintiffs are natural persons except the 10th, 11th and 14th plaintiffs which are private limited companies incorporated in Malaysia. The 1st defendant is also a company incorporated in Malaysia.

The 2nd and 3rd defendants were at all material times the directors and shareholders of the 1st defendant company. According to paragraphs 16 and 17 of the statement of claim, by an agreement entered into on 3 November 1986 between the 1st to 10th plaintiffs of the one part and the 1st defendant company of the other part, these 10 plaintiffs agreed to sell their individual shares in a company known as Seri Naga Construction Sdn. Bhd. on the terms and condition stated in the agreement for a total consideration of RM1,000,000, which was payable by the 1st defendant. The 2nd and 3rd defendants were not parties to the agreement. It was not in dispute that the 1st defendant had paid the sum of RM150,000 pursuant to the agreement. The balance of RM850,000, however, was not admitted by the defendants to be owing, though demanded by the plaintiffs. It is alleged in paragraphs 20, 24, 25 and 28 of the statement of claim as follows:

> 20. In breach of the above terms and conditions of the said agreement the 1st defendants have failed to pay to the 1st to 10th plaintiffs the balance sum of Ringgit Eight Hundred and Fifty Thousand (RM850,000) or any part thereof.
> 24. The 12th, 13th and 14th plaintiffs executed guarantees in favour of KUBB to guarantee the repayment of the loan by the 11th plaintiff to KUBB.
> 25. By an agreement evidenced by various letters exchanged and meetings between the 12th plaintiff for and on behalf of himself and the 13th and 14th plaintiffs, the defendants and KUBB, the defendants agreed and undertook to pay the balance purchase price directly to KUBB to redeem the said land and discharge the 12th, 13th and 14th plaintiffs from their liability under the guarantees in favour of KUBB.
> 28. In breach of the agreement referred to in paragraph 24 above and despite various requests and demands the defendants have omitted, neglected, failed and/or refused to assume the liability of the 11th plaintiff and discharge the guarantees executed by the 12th, 13th and 14th plaintiffs.

The plaintiffs claim judgment for RM850,000 with interest and damages, with also two alternative claims and costs against the defendants.

The three defendants entered appearance to the writ on 28 March 1990 through their solicitors, who filed the defence on 17 April 1990 resisting the claims. Paragraphs 5, 6 and 7, of the defence refer to the agreement of 3 November 1986, and paragraph 11 refers to another agreement dated 31 October 1988. These four paragraphs read as follows:

> 5. The defendants make no admission as to paragraph 20 of the statement of claim. The defendants contend that it was an express term of clause 8.1 of the said agreement that in the event the purchaser shall for any reason whatsoever fail or refuse to complete the sale and purchase of the said shares therein the vendors shall be entitled to forfeit the said deposit of RM150,000 paid under sub-clause 2.2.1 and forthwith the agreement shall be rendered as null and void and be of no further force or effect.
> 6. The defendants will refer to the said agreement at the trial of this action for its full term and effects.
> 7. The defendants aver that in view of clause 8.1 of the said agreement the plaintiffs' claim herein has been extinguished.
> 11. By a sale and purchase agreement dated 31 October 1988 entered into between the 1st defendant and Sutra Development Sdn. Bhd. with the knowledge and consent of the 12th plaintiff the said Sutra Development Sdn. Bhd. agreed to take over and accepted liabilities of the loan granted by KUBB together with accrued interest to the 11th plaintiff. Further, the said Sutra Development Sdn. Bhd. assumed liabilities of 12th, 13th, and 14th plaintiffs as the Directors and Guarantors of the 11th plaintiff for the said loan. The defendants will refer to the said Contract at the trial of this action for its full terms and effect.

The plaintiffs filed their undated reply joining issue with the defendants in their defence. The expression "joining issues" suggests to me that there is an issue of fact or law the determination of which has either an important or decisive bearing on the outcome of the case.

Application for summary judgment

The plaintiffs applied for summary judgment by summons-in-chambers dated 19 June 1990.

Three affidavits of the 12th plaintiff (Mohd. Ali Dewal) were filed in support thereof, while one affidavit by the 3rd defendant and another by the 2nd defendant were filed on behalf of the three defendants, opposing the plaintiffs' application. The Senior Assistant Registrar dismissed the plaintiffs' application. The plaintiffs then filed appeal to the Judge in chambers (Encl. (23)) and on 23 July 1992, I allowed the plaintiffs' appeal and entered judgment in favour of the plaintiffs for RM850,000 with interest and costs, and damages to be assessed. Subsequently, I allowed the 2nd and 3rd defendants' application for further argument on the plaintiffs' appeal (which is the present subject matter) which was fixed for hearing at 9.00 a.m. on 20 May 1993, a date suitable to Counsel for both sides. (The 1st defendant had not applied for further argument). However, by letter dated 17 May 1993, that is, three days before the hearing of further argument, the solicitors for the plaintiffs applied for adjournment of the hearing on the ground that they had filed notice of appeal against my decision of 20 April 1993, in the exercise of my discretion, to enlarge time to enable the 2nd and 3rd defendants to apply for further argument in open Court on the plaintiffs' appeal. The 2nd and 3rd defendants' solicitors promptly objected by letter of the same date to the adjournment. The Court refused to grant the plaintiffs' application for adjournment and I had expected Counsel for both sides to be punctual and present in Court on the date as fixed. However, neither the plaintiffs' Counsel nor their solicitor was present in Court when the hearing of further argument in open Court on the plaintiffs' appeal (Encl. (23)) was called up for hearing on 20 May 1993 at 10.15 a.m. I decided to proceed to hear Mr. Wong Kim Fatt, new Counsel for the 2nd and 3rd defendants in the absence of the plaintiffs and their Counsel. After reading Mr. Wong Kim Fatt's written outline of submissions and hearing his oral submission in open Court, I had no difficulty in deciding to set aside my order of 23 July 1992 and dismissing the plaintiffs' appeal with costs. My reasons are as follows.

Reasons for dismissal

Mr. Wong brought to my attention the indisputable fact that the application for summary judgment dated 19 June 1990 was made long after the filing of defence on 17 April 1990. He cited the Supreme Court case of *Krishnamurthy v. Malayan Finance Corporation Bhd.* [1986] 2 MLJ 134, in which the Court said at p. 135:

> In the second place the law as to the time when an application for an Order 14 judgment could be made is settled law. The application must be made after an appearance has been entered and it could be made either before or after the delivery of defence provided that where it was made after the delivery of the defence, the plaintiff must explain the delay. If this explanation was not accepted by the Court no Order 14 judgment could be signed.

Now, with hindsight and on re-reading carefully the affidavits filed on behalf of the plaintiffs in support of their application for summary judgment under O. 14 of the Rules of the High Court 1980, I have not been able to find any explanation for the delay of some two months in making the application. As the appearance was entered on 28 March 1990, the application should have been made shortly after that. Since the plaintiffs did not explain in their affidavits the delay in making their application after the delivery of defence, I am, guided by the *Krishnamurthy* case, constrained to hold that summary judgment should not be entered.

Mr. Wong further contended that there are triable issues which can only be resolved at the trial. In this connection, I have read and considered carefully the statement of claim, the defence and the plaintiffs' reply.

Firstly, I note at para 6(a) of the plaintiffs' reply they say that they "will refer to and rely on the letter dated 19 March 1987, for its full terms and effects at the trial of this matter". This letter (marked Exb. "AD3" of the 12th plaintiff) was from Kewangan Usaha Bersatu Bhd. (KUBB) to Seri Naga Construction Sdn. Bhd. offering the latter a term loan of RM850,000 on terms and conditions. It appears from the plaintiffs' own reply that the terms and effects of this letter will require judicial interpretation at the trial. It is a triable issue. In the event summary judgment cannot be granted.

Secondly, the plaintiffs appear to base their claim on the defendants' alleged breach of the agreement dated 3 November 1986, which was entered into between the 1st to the 10th defendants and the 1st defendant company. The 2nd and 3rd defendants have raised the issue in paragraphs 5 and 7 of their defence that the plaintiffs' claim is extinguished, on default or

non-completion by the 1st defendant, by the forfeiture of the deposit of RM150,000 by the plaintiffs under the provisions of the clause 8.1 of that agreement which reads as follows:

> 8.1. The parties hereto hereby agree that in the event the purchaser shall for any reason whatsoever fail or refuse to complete the sale and purchase of the said shares herein the vendors shall be entitled to forfeit the said deposit of RM150,000 paid under sub-clause 2.2.1 and forthwith this agreement shall be rendered as null and void and be of no further force or effect.

The plaintiffs contend otherwise in paragraph 4 of their reply, which reads as follows:

> 4. The defendants' averments in paragraph seven (7) of the defence are incorrect and untrue. The plaintiffs deny that their claim is extinguished by reason of clause 8.1 of the agreement dated 3 November 1986.

Whether the forfeiture by the plaintiffs of the deposit of RM150,000 extinguishes their claim or is sufficient compensation to them or not may involve the application of s. 75 of the Contracts Act 1950 in the light of evidence adduced at the trial. To my mind, this is a material question of interpretation based on a finding of facts, at the trial, of the intention of the parties. It may call for a close and careful consideration of the Federal Court case of *Jaganathan v. Linggi Plantations Ltd.* [1969] 2 MLJ 253.

Thirdly, in paragraph 25 of the statement of claim, it is stated that the defendants agreed and undertook to pay the balance of the purchase price. The plaintiffs did not specify which defendant had agreed and given the undertaking to make the payment. The 2nd and 3rd defendants deny the plaintiffs' allegations. This surely is a question of fact which can only be determined at the trial after hearing witnesses and assessing their credibility, and not on conflicting affidavit evidence. In para 28 of the statement of claim, the plaintiffs allege that the defendants refused to assume the liability. The defendants, however, put them to strict proof. In paragraph 17 of the statement of claim, it was the 1st defendant alone that was alleged to be liable for payment of the consideration of RM1,000,000. Under paragraph 1 of the statement of defence which I have referred above, it is alleged that, under the sale and purchase agreement dated 31 October 1988 entered into between the 1st defendant and Sutra Development Sdn. Bhd., Sutra Development Sdn. Bhd. had agreed to take over the liabilities. The 2nd and 3rd defendants were not parties to this agreement. In this connection, it may well be necessary to consider at the trial the terms and effects of this agreement of 31 October 1988 (exhibit AD 11 to affidavit of the 12th plaintiff dated 8 March 1991). Clause 4 thereof reads as follows:

> 4. *Assumption of Liabilities*
>
> 4.1 The purchaser (i.e. Sutra Development Sdn. Bhd.) shall assume and takeover the loan granted by KUBB together with accrued interests to Madon Sdn. Bhd. (11th plaintiff) which at 31 August 1988 stands as follows:
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> | | |
> |---|---|
> | Principal amount | RM850,000 |
> | Outstanding interest | RM210,000 |
>
> 4.2 The purchaser hereby further agrees covenants and undertakes with the vendors that after the date of this agreement all directors nominated and appointed by the purchaser shall assume the liabilities of the Directors as guarantors for the loan referred to in clause 4.1 hereinbefore and the purchaser shall cause such newly nominated and appointed Directors of the Company to execute guarantee agreement in such form as may be approved by KUBB.

Paragraph 32 of the statement of claim contains the prayers in which the plaintiffs are making various claims, with 2 alternatives, including the equitable remedy of specific performance and damages. These claims are denied by the defendants. I am of the opinion that the various issues raised in the defence and reply and highlighted in the affidavits can only be determined at the trial. They are triable issues which are best resolved at the trial itself where the trial Judge has the advantage of seeing and hearing the witnesses for the parties and assessing their evidence and credibility. (See *New Straits Times (M) Sdn. Bhd. v. Kumpulan Niaga* [1985] 1 MLJ 226 and *National Company for Foreign Trade v. Kayu Raya Sdn. Bhd.* [1984] 2 MLJ 300.)

On reading and considering the pleadings and the affidavits filed for both sides, I am unable to resolve the issues on the conflicting affidavit evidence before me. It is therefore obvious that I cannot decide the case on affidavit evidence alone.

Accordingly, under O. 56 r. 2(2), I set aside my order of 23 July 1992 and dismissed the plaintiffs' appeal. I affirmed the order of the Senior Assistant Registrar who dismissed the plaintiffs' application for summary judgment. The plaintiffs are to pay the costs of the hearing before me and the Senior Assistant Registrar. I would like to make it clear that, at this interlocutory stage of the proceedings, I have not formed, and ought not to form, any opinion on the merit or final outcome of the case of either party, as this can only be decided at the end of the trial.

DABAL B. ANDING @ DABAL B. DHARU

v.

PUBLIC PROSECUTOR

HIGH COURT, TAWAU
TUAN IAN H.C. CHIN J.
[CRIMINAL APPPEAL NO. T(42) - 11 OF 1993]
16 MARCH 1994

CRIMINAL APPEAL: Outraging modesty - Penal Code s. 354 - Charge for single offence - Magistrate made a finding of fact that five similar offences committed by accused - Accused convicted - Whether conviction proper - Whether trial resulted in miscarriage of justice - Magistrate visited scene of crime after close of case - Conclusion of facts against accused made from observation at scene of crime - Whether accused prejudiced.

This was an appeal by the appellant against his conviction on a charge under s. 354 of the Penal Code. The appellant was a teacher at Sekolah Rendah Tanjong Batu Darat, Tawau, Sabah and the charge against him was that between January 1991 and July 1991, between 7.15 a.m and 5.45 p.m, at the said school, he used criminal force on one eight year old student girl with intention to outrage her modesty. The charge did not specify the exact location in the school where the offence was alleged to have been committed.

At the trial it was put in evidence that the appellant had also outraged the modesty of the child once at the appellant's house. Evidence was further led that three other such incidents within the school compound had taken place involving the appellant and the child. In her judgement the learned Magistrate made a finding of fact that all five incidents,including the one in the house, took place as alleged and went on to record a conviction based on that finding.

The facts further showed that after the close of the case, the learned Magistrate visited the school and from observations she made there, came to a finding that she disbelieved the story of the appellant with respect to the visibility of the library and the classroom to people in nearby locations.

The question was whether the trial had occasioned a miscarriage of justice and hence whether the conviction of the appellant could stand.